ATTORNEY FOR APPELLANT:

LISA M. JOHNSON
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

JUSTIN F. ROEBEL
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

RONNIE C. WILLIAMS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0703-CR-274
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert R. Altice, Jr., Judge
Cause No. 49G02-0512-FA-212629

December 5, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Following a jury trial, Appellant-Defendant Ronnie Williams appeals his convictions and aggregate ninety-four-year sentence for two counts of Attempted Murder, a Class A felony (Counts I and II);[1] Robbery as a Class B felony (Count III);[2] four counts of Criminal Confinement as a Class B felony (Counts IV, V, VI, and VII);[3] Resisting Law Enforcement as a Class D felony (Count IX);[4] Residential Entry as a Class D felony (Count X);[5] and Carrying a Handgun Without a License as a Class A misdemeanor (Count XIV).[6] (Tr. 990-91; App. 4, 23-24) Upon appeal, Williams challenges his attempted murder conviction in Count II on the grounds that the trial court failed to instruct the jury properly regarding accomplice liability, and he seeks to bar retrial by claiming there was insufficient evidence to support his conviction. Williams further challenges his attempted murder convictions in both Counts I and II by claiming the trial court abused its discretion in admitting certain opinion testimony and in refusing his criminal recklessness instruction. Additionally, Williams appeals his convictions for criminal confinement in Counts IV and V on the basis that they violate double jeopardy. Lastly, Williams challenges the appropriateness of his sentence. We affirm in part, reverse in part, and remand.

BACKGROUND FACTS AND PROCEEDINGS

On December 7, 2005, at approximately 10:00 a.m., two masked men entered the Flagstar Bank at 71st Street and Binford Boulevard in Indianapolis. Each man, one in a

[1] Ind. Code §§ 35-42-1-1, 35-41-5-1 (2005).
[2] Ind. Code § 35-42-5-1 (2005).
[3] Ind. Code § 35-42-3-3 (2005).
[4] Ind. Code § 35-44-3-3 (2005).
[5] Ind. Code § 35-43-2-1.5 (2005).
[6] Ind. Code § 35-47-2-1 (2005)

black hooded sweatshirt and the other in a gray hooded sweatshirt, carried a gun. They approached bank employee Rada Stroder, who was in her office near the front door, and demanded to know where the money was. Stroder took them to the back area of the bank and to the vault room where the men, one of them pointing a gun to her head, told her to "get the money." Tr. p. 114.

Bank employees Abbey King and Dawn Brenton were also working at the time. King and Brenton were in a back room balancing the Automated Teller (ATM) Machine when King noticed two "suspicious looking" people enter the bank and heard them yell loudly. King hit two silent panic buttons. The men, one with Stroder by the arm and a gun pointed at her, came toward the back area to the vault room. The men found King and Brenton and told them to lie on the ground. The men demanded that the women "get the money." Tr. p. 113. The vault, which was controlled by a timer, could not be opened immediately. At some point, Stroder pushed the gun away, and it went off, but no one was hit.

In compliance with their demands, Brenton directed the men to the money from the ATM machine in the back room. One of the men took the money from the ATM canisters and put it into his bag. King then opened her teller drawer, and one of the men took the money from the drawer and placed it into his bag. The men then demanded that Brenton and King return to the vault room where Stroder remained. The men closed the vault room door and told the women to count to thirty before coming out.

The men ran out of the bank and into a waiting vehicle. Shortly thereafter, Marion County Sheriff's Deputies Gary Schuller and Bradley Millikan stopped the suspects'

vehicle near the corner of 75th Street and Allisonville Road, with Deputy Schuller parking approximately seventy-five feet behind the vehicle and Deputy Millikan stopping approximately seventy-five feet in front of it. Deputy Schuller exited his patrol car and observed the passenger in the front seat of the suspects' vehicle make several attempts to exit the vehicle. Deputies Schuller and Millikan repeatedly ordered the passenger to stay in the vehicle. The passenger, identified at trial to be Ronnie Williams, ultimately got out of the vehicle and shot multiple times at Deputy Schuller, hitting him in the left thigh, before running off into a nearby wooded area. As Deputies Schuller and Millikan returned fire, the back seat passenger, whom Deputy Schuller later identified to be Ryan Williams, exited the vehicle and began firing his gun at Deputy Schuller while running off into the wooded area as well. Deputy Millikan responded by firing his weapon at Ryan as well. Ryan then fired a shot at Deputy Millikan. The driver stayed inside the vehicle until he was ordered out and taken into custody.

Williams and Ryan were subsequently apprehended inside two nearby residences. Williams was located in the attic of a residence at 7422 Glenmora Avenue, near a Ruger handgun and a black bag containing $37,851. Ryan was located inside of a garment bag in the basement of a residence at 7414 Glenmora Avenue. Additional money not belonging to the homeowners was found in the seat cushion in that basement. Police also discovered a Steyr handgun covered in motor oil in the garage of the residence at 7414 Glenmora Avenue.

On December 9, 2005, the State charged Williams with two counts of attempted murder (Counts I and II), robbery (Count III), four counts of criminal confinement

(Counts IV-VII), aggravated battery (Count VIII), resisting law enforcement (Count IX), residential entry (Count X), and carrying a handgun without a license (Count XIV). Williams and Ryan were tried jointly on January 22-25, 2007. The jury found Williams guilty on all counts.[7]

At the February 21, 2007 sentencing hearing, the trial court vacated Williams's conviction for Count VIII, aggravated battery. The court then sentenced Williams to the following terms: fifty years in the Department of Correction for Count I; twenty years for Count II; ten years for Count III; ten years each for Counts IV, V, VI, and VII; one and one-half years for Count IX; one and one-half years for Count X; and one year for Count XIV. The court ordered that the sentences were to be served consecutively, but that the ten-year sentences in Counts IV, V, VI, and VII were to be served concurrent with each other and consecutive to the remainder of the sentence, for an aggregate ninety-four-year sentence. This appeal follows.

DISCUSSION AND DECISION

I. Accomplice Liability Instruction

Williams first claims that the trial court committed fundamental error in erroneously instructing the jury regarding attempted murder and accomplice liability. Williams argues that, because there was no evidence that he ever pointed a gun at Deputy Millikan, he could only be convicted of the attempted murder of Deputy Millikan under an accomplice liability theory. Williams points out, however, that the jury instruction on

[7] The jury acquitted Ryan of both counts of attempted murder and of aggravated battery but found him guilty of robbery, four counts of criminal confinement, resisting law enforcement, residential entry, theft, resisting law enforcement, and carrying a handgun without a license.

accomplice liability was fatally flawed. As Williams argues, the instruction failed to specify that both Williams and Ryan needed to have specific intent to kill in order to sustain a conviction for attempted murder. The State responds by conceding that, given the lack of evidence demonstrating Williams committed attempted murder as a principal actor, the jury instruction on accomplice liability, which failed to specify the required specific intent of both the principal and the accomplice, may have constituted fundamental error.

Because of the stringent penalties for attempted murder and the ambiguity often involved in its proof, the Indiana Supreme Court has singled out attempted murder for special treatment. *Hopkins v. State*, 759 N.E.2d 633 637 (Ind. 2001). A conviction for attempted murder requires proof of specific intent to kill. *Id*. (citing *Spradlin v. State*, 569 N.E.2d 948, 950 (Ind. 1991)). Additionally, where the State seeks a conviction for attempted murder on an accomplice liability theory, the Supreme Court has held that the State has the burden of proving (1) that the accomplice, acting with specific intent to kill, took a substantial step toward the commission of murder; and (2) that the defendant, also acting with the specific intent to kill, knowingly or intentionally aided, induced, or caused the accomplice to commit the crime of attempted murder. *Id*. (citing *Bethel v. State*, 730 N.E.2d 1242, 1246 (Ind. 2000)).

In this case, the trial court gave the following instructions applicable to accomplice liability for attempted murder in Count II:

PRELIMINARY INSTRUCTION NO. 8

The crime of Attempted Murder is defined as follows:

A person Attempts to commit a Murder when, acting with the specific intent to kill another person, he engages in conduct that constitutes a substantial step toward killing that person.

Before you may convict either or both Defendants of Attempted Murder, as charged in Count II, the State must prove each of the following elements beyond a reasonable doubt:

1. the Defendants Ronnie Williams and/or Ryan Williams
2. acting with the specific intent to kill Bradley Millikan
3. did shoot a deadly weapon, that is: a handgun, at and toward Bradley Millikan
4. which was conduct constituting a substantial step toward the commission of the intended crime of Murder.

As to each Defendant if the State fails to prove each of these elements beyond a reasonable doubt, then you must find that Defendant not guilty of Attempt Murder.

App. p. 104.

FINAL INSTRUCTION NO. 5

A person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense, even if the other person:

(1) has not been prosecuted for the offense
(2) has not been convicted of the offense
Or
(3) has been acquitted of the offense[.]

App. p. 158.

FINAL INSTRUCTION NO. 6

To be convicted of a crime under the theory of accomplice liability, it is not necessary that the defendant participate in every element of that crime.

The defendant's presence during the commission of the crime or his failure to oppose the crime are, by themselves, insufficient to establish accomplice liability; however, they may be considered along with other facts and circumstances tending to show participation.

In determining whether a person aided, or was an accomplice to another in the commission of a crime, the following factors may be considered: (1) presence at the scene of the crime, (2) companionship with another engaged in criminal activity; (3) failure to oppose the crime; and

> (4) the defendant's conduct before, during, and after the occurrence of the crime.

App. p. 159.

Here, the trial court instructed the jury regarding the specific intent necessary to convict for attempted murder, but it did not indicate that this specific intent requirement also applied to accomplice liability for attempted murder. *See Bethel*, 730 N.E.2d at 1246. While Williams did not object or tender a correct instruction on this basis, he claims fundamental error, and the State concedes fundamental error likely occurred. *See Hopkins*, 759 N.E.2d at 638-39.

Fundamental error is a substantial, blatant violation of due process. *Id*. at 638. It must be so prejudicial to the rights of a defendant as to make a fair trial impossible. *Id*. In *Hopkins* the Indiana Supreme Court determined that the failure of the trial court to instruct the jury regarding the specific intent requirement for an accomplice liability theory of attempted murder constituted fundamental error because the defendant's intent to kill was squarely at issue. 759 N.E.2d at 638-39.

Here Williams's intent was similarly squarely at issue. Indeed, his closing argument began with the statements, "Ronnie Williams did not intend to kill Officer Schuller; Ronnie Williams did not intend to kill Officer Millikan." Tr. p. 833. As Williams argues, there was no testimony that he pointed a gun or fired in Deputy Millikan's direction, and given the jury's acquittal of Ryan on the attempted murder charges, the evidence supported a finding that Williams and Ryan were not acting in concert such that any inference of intent resulting from Ryan's shooting at Deputy

Millikan would not automatically be attributable to Williams as well. Because Williams's intent was fundamental to his case, and because the jury was not properly instructed that it was required to find beyond a reasonable doubt that Williams possessed the specific intent to kill Deputy Millikan, we are unable to affirm the trial court's judgment of conviction on Count II and must conclude the erroneous instruction adversely affected Williams's substantial rights so as to constitute fundamental error. *See Hopkins*, 759 N.E.2d at 639.

II. Sufficiency of the Evidence

Seeking to bar retrial on Count II, Williams additionally argues that there was insufficient evidence to convict him of the attempted murder of Deputy Millikan as charged in Count II. While he acknowledges that an accomplice's criminal liability is determined irrespective of the principal's, Williams argues that Ryan's acquittal of the attempted murder of Deputy Millikan suggests that the jury concluded Ryan did not have the specific intent to kill Deputy Millikan and/or that he did not commit a substantial step toward killing him. Williams further argues, given Ryan's acquittal on Count I, that the jury may have concluded Ryan and Williams were not acting in concert. According to Williams, because there was no evidence he shot at Deputy Millikan, and given Ryan's acquittals on both counts of attempted murder, undermining both the possibility that Ryan acted as the principal and that Williams and Ryan were acting in concert, there was insufficient evidence to support his attempted murder conviction under an accomplice liability theory in Count II.

In reviewing a claim of insufficient evidence, we will affirm the conviction unless, considering only the evidence and all reasonable inferences favorable to the judgment, and neither reweighing the evidence nor judging the credibility of the witnesses, we conclude that no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Bethel*, 730 N.E.2d at 1243.

To support the conviction in Count II, attempted murder of Deputy Millikan, under a theory of accomplice liability, the State was required to prove that Williams, with the specific intent that the killing occur, knowingly or intentionally aided, induced or caused his accomplice Ryan to commit the crime of attempted murder. *Id*. at 1246. Therefore, in order to convict Williams for the offense of aiding an attempted murder, the State must prove (1) that Ryan, acting with the specific intent to kill, took a substantial step toward the commission of murder, and (2) that Williams, acting with the specific intent that the killing occur, knowingly or intentionally aided, induced or caused Ryan to commit the crime of attempted murder. *Id*.

We first observe that, as Williams concedes, pursuant to Indiana Code section 35-41-2-4 (2005), Williams's conviction as an accomplice is not dependent upon Ryan's conviction as principal. With that in mind, we conclude there was sufficient evidence to support Williams's conviction for the attempted murder of Deputy Millikan under a theory of accomplice liability. Testimony at trial indicated that Ryan pointed his gun at Deputy Millikan and fired. Intent to kill may be inferred from the deliberate use of a deadly weapon in a manner likely to cause death or serious injury. *Bethel*, 730 N.E.2d at 1245. We have also found sufficient evidence of attempted murder when the evidence

indicates that a weapon was fired in the direction of the victim. *Id*. Further, as the State argued at trial, there was ample evidence demonstrating Williams and Ryan acted in concert. They robbed a bank and escaped together; after police officers frustrated their escape attempts, Williams exited the vehicle, shooting at and hitting Deputy Schuller; within moments, Ryan also exited the vehicle and fired at Deputy Schuller; Williams, with Ryan behind him, ran off into the woods while Ryan shot his gun at Deputy Millikan; and Williams and Ryan were apprehended in the same vicinity. Williams and Ryan, who were jointly escaping their armed bank robbery, would have had a common motive to kill the sheriff's deputies attempting to stop them. Regardless of the jury's verdict with respect to Ryan, which under Indiana law we are not required to reconcile, this evidence is sufficient to support a finding by the jury that Williams was guilty of the attempted murder of Deputy Millikan as alleged in Count II.

We have determined that there was fundamental error with respect to the jury instructions as they impacted Williams's conviction for attempted murder in Count II. We have also determined, however, that there was sufficient evidence to support this conviction such that retrial is not barred on double jeopardy principles. *See Robinette v. State*, 741 N.E.2d 1162, 1168 (Ind. 2001) (concluding double jeopardy does not bar retrial when there is sufficient evidence to support a conviction). Accordingly, we reverse Williams's conviction on Count II and remand for a new trial.

III. Admissibility of Opinion Testimony

Williams further challenges his attempted murder convictions in Counts I and II by claiming abuse of discretion by the trial court and fundamental error due to the court's

admitting into evidence Deputy Millikan's testimony that he thought Williams was "trying to kill Deputy Schuller." Tr. p. 337. Williams contends this statement constituted opinion testimony concerning intent, which is inadmissible in a criminal case pursuant to Indiana Rule of Evidence 704(b).

Having already found reversible error with respect to Count II, we evaluate this claim with respect to Count I only. Indiana Rule of Evidence 704(b) provides in pertinent part that "[w]itnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case[.]" Generally, the admission or exclusion of evidence is a determination entrusted to the discretion of the trial court. *Farris v. State*, 818 N.E.2d 66, 67 (Ind. Ct. App. 2004), *trans. denied*. We will reverse a trial court's decision only for an abuse of discretion. *Id*. Such abuse of discretion occurs when the trial court's action is clearly erroneous and against the logic and effect of the facts and circumstances before it. *Id*.

Here, Deputy Millikan testified that he thought Williams was "trying to kill Deputy Schuller." Pursuant to Rule 704(b), such testimony regarding intent was impermissible. *See Gall v. State*, 811 N.E.2d 969, 976 (Ind. Ct. App. 2004) (citing *Weaver v. State*, 643 N.E.2d 342, 345 (Ind. 1994)), *trans. denied*. In light of the fact that Williams was being tried for the attempted murder of Deputy Schuller and Deputy Millikan's testimony stated that it appeared Williams was "trying to kill Deputy Schuller," a direct statement of Williams's intent, we must conclude the admission of this statement into evidence was error.

However, errors in the admission or exclusion of evidence are to be disregarded as harmless error unless they affect the substantial rights of a party. *Id*. (citing Indiana Trial Rule 61). An error will be found harmless if its probable impact on the jury, in light of all of the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties. *Id*. Here, Deputy Schuller testified that Williams pointed a gun directly at him, fired multiple shots, and succeeded in hitting him, knocking Deputy Schuller to the ground. We acknowledge, as Williams points out, that the use of a deadly weapon in a manner likely to cause death, in and of itself, is not equivalent to a conscious objective to kill. *McCann v. State*, 854 N.E.2d 905, 911 (Ind. Ct. App. 2006) (quoting *Booker v. State*, 741 N.E.2d 748, 756 (Ind. Ct. App. 2000)). However, an evaluation of the accompanying facts and circumstances in this case adequately demonstrates Williams's conscious objective to kill such that Deputy Millikan's statement would not have substantially affected Williams's rights. As Deputy Schuller testified, Williams, who was escaping from his armed bank robbery and was within feet of Deputy Schuller as he exited his car, pointed a gun at Deputy Schuller, fired it multiple times, and hit Deputy Schuller before running away. The jurors would have been aware from their preliminary instructions that they could infer intent from the facts and circumstances. We are not convinced that the admission into evidence of Deputy Millikan's testimony stating a rather obvious observation under the above circumstances would have substantially affected Williams's rights. *See id*. at 910-11 (finding jury instruction failing to specify specific intent required for attempted murder conviction did not prejudice defendant based upon facts and circumstances of crime, including use of deadly weapon,

tending to establish requisite specific intent). Accordingly, we decline Williams's claim for relief on this point.

IV. Merger

Williams next challenges his convictions under Counts IV and V, the criminal confinement of Stroder, by claiming they should merge under the continuing crime doctrine because they involve only one distinct confinement. The State concedes that Williams's two separate confinement convictions in Counts IV and V may be improper. We agree.

Article 1, Section 14 of the Indiana Constitution provides that "[n]o person shall be put in jeopardy twice for the same offense." The right not to be placed in jeopardy twice stems from the underlying premise that a defendant should not be tried or punished twice for the same offense. *Boyd v. State*, 766 N.E.2d 396, 399-400 (Ind. Ct. App. 2002). It is the defendant's burden on appeal to demonstrate that his convictions violated his constitutional right to be free from double jeopardy. *Id*. at 400.

Crimes including kidnapping and the lesser included offense of confinement are defined under the continuing crime doctrine. *Bartlett v. State*, 711 N.E.2d 497, 500 (Ind. 1999). Under this doctrine, the span of the kidnapping or confinement is determined by the length of time of the unlawful detention necessary to perpetrate the crime. *Id.* It begins when the unlawful detention is initiated and ends only when the victim both feels, and is in fact, free from detention. *Id*. Although a single incident of confinement may result in two separate convictions, in such cases the confinement must be divisible into two separate parts. *Boyd*, 766 N.E.2d at 400. A confinement ends when the victim both

feels and is, in fact, free from detention, and a separate confinement begins if and when detention of the victim is re-established. *Id*.

Williams's conviction in Count IV was based upon his removing Stroder from the lobby of the bank to a locked teller area of the bank. His conviction in Count V was based upon his confining Stroder by forcing her to enter and remain in a room at gunpoint. There was no evidence, nor does the State point to any, suggesting that Stroder felt free and was free from detention at any time within the span of her confinement during the bank robbery, regardless of the number of rooms to which she was confined. As there was but one continuous period of confinement, and both of Williams's convictions flowed from that offense, Williams's dual convictions and sentences in Counts IV and V violate the double jeopardy clause of the Indiana Constitution. Accordingly, his conviction and sentence in Count V, which merge into his conviction and sentence in Count IV, must be vacated.

V. Criminal Recklessness Instruction

Williams additionally argues that the trial court erred in failing to instruct the jury on criminal recklessness. As the Indiana Supreme Court has stated,

> A requested instruction for a lesser included offense of the crime charged should be given if the lesser included offense is either inherently or factually included in the crime charged, and if, based upon the evidence presented in the case, there existed a serious evidentiary dispute about the element or elements distinguishing the greater from the lesser offense such that a jury could conclude that the lesser offense was committed but not the greater.

White v. State, 849 N.E.2d 735, 739 (Ind. Ct. App. 2006) (quoting *Ellis v. State*, 736 N.E.2d 731, 733 (Ind. 2000) (internal quotations omitted)), *trans. denied*. If a trial court

rejects a tendered lesser-included offense instruction on the basis of its view of the law, as opposed to a finding that there is no serious evidentiary dispute, appellate review is *de novo*. *Id*. Here, in considering the tendered instruction, the trial court did not reach the question of whether there was a serious evidentiary dispute, instead determining that the proffered instruction was not a lesser-included offense based upon its view of the law. We therefore review its decision *de novo. See id*.

It is well-established in Indiana that criminal recklessness is not an inherently included offense of attempted murder. *Id*. (citing *Ellis*, 736 N.E.2d at 734). However, the question of whether an offense is a factually lesser-included offense of another offense requires a case-by-case determination. *Id*. In order to make this determination, a trial court must compare the statute defining the alleged lesser-included offense with the charging instrument in the case. *Id*. If the charging instrument alleges that the means used to commit the crime charged include all of the elements of the alleged lesser-included offense, then the alleged lesser-included offense is factually included in the crime charged. *Id*. The State may foreclose instruction on a lesser offense that is not inherently included in the crime charged by omitting from a charging instrument factual allegations sufficient to charge the lesser offense. *Id*.

In *White*, this court, following Indiana Supreme Court precedent in *Ellis* and *Wilson v. State*, 697 N.E.2d 466, 477 (Ind. 1998), concluded that criminal recklessness was not factually included in an allegation of attempted murder because the charging information for attempted murder did not include the element of reckless behavior. *White*, 849 N.E.2d at 740 (citing *Ellis*, 736 N.E.2d at 735). Here, like in *Ellis*, *Wilson*,

and *White*, the charging information in both Counts I and II contained no element of reckless behavior.[8] We therefore find that criminal recklessness was not factually included in the attempted murder charge and that the trial court therefore did not err in refusing to instruct the jury on criminal recklessness.

As Williams points out, we are aware that in *Miller v. State*, 753 N.E.2d 1284, 1287 n.8, 9 (Ind. 2001), the Indiana Supreme Court deemed "respectable" Judge Baker's argument in *Miller v. State*, 726 N.E.2d 349, 356 (Ind. Ct. App. 2000) (Baker, J., concurring in part and dissenting in part), *trans. granted*, *opinion vacated by Miller*, 753 N.E.2d 1284, that criminal recklessness may be a factually lesser-included offense of attempted murder, regardless of whether a charging information for attempted murder includes an element of reckless behavior, if the circumstances support a conclusion that the recklessness offense was a factually included offense of attempted murder. In *Miller*, a majority panel of this court looked to the charging information for attempted murder, determined it did not allege reckless behavior, and concluded that the trial court erred in finding the defendant guilty of three counts of criminal recklessness as lesser include offenses of attempted murder. 726 N.E.2d at 353. Judge Baker disagreed, arguing that the circumstances supported a finding that criminal recklessness was a factually lesser-

[8] The charging information in Count I alleged that Williams "did attempt to commit the crime of Murder, which is to knowingly kill another human being, namely: Gary Schuller, by engaging in conduct, that is: shooting a deadly weapon, that is: a handgun, at and against the person of Gary Schuller, with the specific intent to kill Gary Schuller, resulting in serious bodily injury, that is: a gunshot wound to the leg, which conduct constituted a substantial step toward commission of said crime of Murder[.]"

The charging information in Count II alleged that Williams "did attempt to commit the crime of Murder, which is to knowingly kill another human being, namely: Bradley Millikan, by engaging in conduct, that is: shooting a deadly weapon, that is: a handgun, at and toward Bradley Millikan, with the specific intent to kill Bradley Millikan, which conduct constituted a substantial step toward commission of said crime of Murder[.]" App. pp. 33, 34.

included offense. In making this argument, Judge Baker pointed out that the charging information alleged the defendant had shot "at and toward" police officers, and that it was apparent the defendant knew or should have known shooting toward an officer created a substantial risk of bodily harm, which, according to Judge Baker, established an inference of *mens rea* sufficient to support the criminal recklessness convictions. *Id*. While the Indiana Supreme Court vacated *Miller* on the basis that the claims were not properly preserved, it referred to Judge Baker's dissenting opinion, noting that it was a "respectable argument that criminal recklessness was a factually included offense of attempted murder here." *Miller*, 753 N.E.2d at 1287 n.8.

In arguing in this vein that the court erred in failing to instruct the jury on criminal recklessness, Williams points out that the charging information in his case similarly alleged he shot "at and against" and "at and toward" Deputies Schuller and Millikan respectively. We first note that Judge Baker's reasoning, in the context of *Miller*, served to justify the trial court's determination that criminal recklessness was a factually lesser-included-offense of attempted murder. Here, in contrast, Williams seeks to use this reasoning to challenge the trial court's determination that criminal recklessness was *not* a factually lesser-included offense of attempted murder.

Additionally, given the Supreme Court precedent suggesting that the charging information must include the element of reckless behavior for criminal recklessness to qualify as a factually lesser-included offense, as well as the recent *White* case from our court to this effect, we are not inclined to find error on the part of the trial court in refusing to instruct the jury on criminal recklessness after determining, given the

charging informations, that it was not a factually lesser-included offense of attempted murder in this case.[9]

VI. Sentencing

Williams's final claim upon appeal is a challenge to the appropriateness of his sentence. In requesting the imposition of concurrent advisory sentences, Williams argues that in light of his good character, past good deeds, young age, remorse, stress level at the time of the offense, potential for rehabilitation, level of culpability, and minor criminal history, his aggravated aggregate sentence, totaling almost one hundred years, was not justified.

Article VII, Sections 4 and 6 of the Indiana Constitution "'authorize[] independent appellate review and revision of a sentence imposed by the trial court.'" *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007) (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006) (emphasis and internal quotations omitted)). Such appellate authority is implemented through Indiana Appellate Rule 7(B), which provides that the "Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." We exercise deference to a trial court's sentencing decision, both because Rule 7(B) requires that we give "due consideration" to that decision and because we recognize the unique perspective a trial court has when

[9] We are similarly not inclined to find error in the trial court's refusal of the criminal recklessness instruction based upon the "related offense doctrine," which has not been adopted in Indiana, was not argued below, and which would likely contravene the results mandated by *Ellis*, *White*, and other established precedent. *See Cline v. State*, 726 N.E.2d 1249, 1256 n.5 (Ind. 2000).

making sentencing decisions. *Stewart v. State*, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). It is the defendant's burden to demonstrate that his sentence is inappropriate. *Childress*, 848 N.E.2d at 1080.

The "nature of the offense" portion of the standard articulated in Appellate Rule 7(B) speaks to the statutory advisory sentence for the class of crimes to which the offense belongs. *See Corbin v. State*, 840 N.E.2d 424, 432 (Ind. Ct. App. 2006). That is, the advisory sentence is intended to be the starting point for the court's consideration of the appropriate sentence for the particular crime committed. *Id*. The character of the offender portion of the standard refers to the general sentencing considerations and the relevant aggravating and mitigating circumstances. *Id*.

We first observe that we have already concluded in parts I and IV of this opinion that Williams's convictions and sentences in Counts II and V should be vacated, so we find it unnecessary to consider his sentences on those counts in reviewing the overall appropriateness of his sentence. Regarding his remaining convictions, the trial court sentenced Williams to a maximum fifty-year sentence for his attempted murder conviction in Count I, to be served consecutive to the following: his advisory ten-year robbery conviction in Count III; his concurrent advisory ten-year sentences in Counts IV, VI, and VII; his advisory one and one-half year sentence in Count IX; his advisory one and one-half year sentence in Count X; and his maximum one-year sentence in Count XIV, resulting in an aggregate sentence of seventy-four years. In pronouncing this sentence, the trial court found as a mitigator the hardship of such sentence on Williams's

dependents, and as aggravators the fact that he was on probation and on bond at the time of the instant offenses.

Williams concedes that the offenses at issue were "unquestionably serious." Appellant's Brief p. 37. Indeed they were. Williams terrorized three bank employees by robbing them at gunpoint. After his attempt to escape in a waiting car proved futile, he initiated a public firefight with sheriff's deputies during which he pointed a gun directly at a deputy, fired multiple times, and hit the deputy in the leg causing him ongoing injury. We fail to see how Williams's failure to shoot at more than one deputy or the fact that Ryan's gun, not his, discharged during their armed robbery, somehow suggests that his crimes were less egregious.

Further, while Williams points to his prior employment, church attendance and various achievements and good deeds from his past, he also was convicted twice for marijuana possession and was on probation and out on bond at the time of the instant offenses. To the extent Williams's past reflects favorably upon his character, its effect is largely diminished by the great negative effect on his character of the instant crimes, which—not incidentally—were committed while he was on probation and out on bond. Further, although Williams alleges remorse, the trial court was in a better position than we to make that determination, and the trial court did not find Williams to be remorseful. *See Corralez v. State*, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004). In sum, given Williams's remarkably serious offenses endangering innocent citizens and sheriff's deputies, we decline his claim that his character is nevertheless sufficiently outstanding such that the trial court's sentence is inappropriate.

The judgment of the trial court is affirmed in part and reversed in part, and the cause is remanded with instructions.

NAJAM, J., and MATHIAS, J., concur.